STATE OF MICHIGAN

COURT OF APPEALS

ANAND ISKA,

Plaintiff-Counterdefendant-Appellant-Cross-Appellee,

v

LAVANYA A. ISKA,

Defendant-Counterplaintiff-Appellant-Cross-Appellant.

UNPUBLISHED
September 28, 2006

No. 266572
Genesee Circuit Court
LC No. 02-238042-DM

Before: Davis, P.J., and Murphy and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right, and defendant cross appeals by leave granted, from a judgment of divorce and order setting child support. We affirm in part and remand for further proceedings regarding the issue of child custody.

We first consider the parties' respective challenges to the trial court's decision to award them joint physical and legal custody of their daughter. Pursuant to MCL 722.28, we must affirm the trial court's decision unless the court "made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." A trial court commits legal error if it erroneously chooses, interprets, or applies the law. *Mason v Simmons*, 267 Mich App 188, 194; 704 NW2d 104 (2005); *Foskett v Foskett*, 247 Mich App 1, 4-5; 634 NW2d 363 (2001). The court's findings of fact will be sustained on appeal under the great weight of the evidence standard unless the evidence clearly preponderates in the opposition direction. *Id.* at 5. Although the trial court need not consider every matter in evidence or every argument raised by the parties, the record must be sufficient for this Court to determine whether the evidence clearly preponderates against the trial court's findings. *MacIntyre v MacIntyre (On Remand)*, 267 Mich App 449, 451-452; 705 NW2d 144 (2005). We give deference to the trial court's assessment of witness credibility. *Id.* at 459. The trial court's discretionary rulings, including its custody decision, are reviewed for an abuse of discretion. *Foskett, supra* at 5.

We agree with plaintiff that defendant has presented arguments on appeal that lack citation to the record, but this same deficiency is also present in plaintiff's brief. "Facts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court." MCR 7.212(C)(7). This Court will not search the record for factual support to sustain a party's claim. *Derderian v Genesys Health Care Systems*, 263 Mich

App 364, 388; 689 NW2d 145 (2004). Further, an issue given only cursory treatment by an appellant may be deemed abandoned. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

Having reviewed the record and considered the arguments presented by each party, we find no basis for disturbing the trial court's finding that the parties' child had an established custodial environment with each party. Whether an established custodial environment existed is a question of fact. *Foskett, supra* at 6. An established custodial environment exists "if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). Such an environment is marked by qualities of security, stability, and permanence. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). It is immaterial if the environment was created by court order, without a court order, or in violation of a court order. *Hayes v Hayes*, 209 Mich App 385, 388; 532 NW2d 190 (1995); see also *Brown v Loveman*, 260 Mich App 576, 596; 680 NW2d 432 (2004) (change in parenting time may amount to change in established custodial environment).

In this case, the evidence supports the trial court's finding that the parenting time arrangement for the child during the lengthy bench trial created an established custodial environment with each parent. Because the evidence does not clearly preponderate against the trial court's finding, it properly applied a clear and convincing evidence standard to determine if either party proved that the child's custodial environment should be changed. *Foskett, supra* at 6.

We further conclude that neither party has established any basis for disturbing the trial court's findings with respect to the best-interest factors in MCL 722.23(a) - (l). The trial court's findings with respect to each factor, although brief, were adequate. *MacIntyre, supra* at 452. We are not persuaded that the evidence clearly preponderates against the trial court's findings with respect to each factor. *Foskett, supra* at 5.

But before the trial court could order joint custody, it was required to consider "[w]hether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." MCL 722.26a(1)(b).[1] The trial court's failure to consider this

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[1] Although the trial court ordered joint physical and legal custody, we note that MCL 722.26a(7) uses the phrase "joint custody" to refer to an order containing one or both of the following:

> (a) That the child shall reside alternately for specific periods with each of the parents.
>
> (b) That the parents shall share decision-making authority as to the important decisions affecting the welfare of the child.

Although plaintiff briefly touches on the issue of whether joint physical custody was actually awarded, no legal analysis or authority is provided in his brief, *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998), nor is the matter framed as a question presented on appeal,

(continued…)

factor constitutes clear legal error. *Molloy v Molloy*, 243 Mich App 595, 607; 628 NW2d 587 (2000), partially vacated on a different issue 243 Mich App 801 (2001)(special conflict panel convened), and mod by special panel 247 Mich App 348; 637 NW2d 803 (2001), vacated in part 466 Mich 852 (2002). Because we are unable to conclude that the error was harmless, we remand to the trial court to reevaluate the entire joint custody decision. *Ireland v Smith*, 451 Mich 457, 468; 547 NW2d 686 (1996). The trial court should consider updated information, and may conduct whatever hearings or proceedings are necessary for it to make an accurate determination. *Id.* at 468-469; *Fletcher v Fletcher*, 447 Mich 871, 889; 526 NW2d 889 (1994).

Plaintiff also raises several evidentiary issues. A trial court's evidentiary decisions are generally reviewed for an abuse of discretion, but questions of law such as the interpretation of the Michigan Rules of Evidence are reviewed de novo. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002).

Regarding the exclusion of an audiotape sought to be introduced by plaintiff, the trial court did not indicate whether it was relying on Michigan or federal law to conclude that the audiotape evidence was inadmissible because plaintiff unlawfully recorded his telephone conversation with defendant. We agree that plaintiff did not violate state law by recording the telephone conversation with defendant where plaintiff was a party to that conversation. MCL 750.539c; *Sullivan v Gray*, 117 Mich App 476, 481; 324 NW2d 58 (1982). We also reject defendant's argument that plaintiff's conduct violated federal law. Unlike *Young v Young*, 211 Mich App 446; 536 NW2d 254 (1995), the instant case does not involve the recording of a spouse's conversation with a third party. Pursuant to 18 USC 2511(2)(d), absent evidence that defendant recorded the conversation for a criminal or tortious act, it was not unlawful for him to do so. See *United States v Zarnes*, 33 F3d 1454, 1469 (CA 7, 1994); *Obron Atlantic Corp v Barr*, 990 F2d 861, 863-864 (CA 6, 1993).

However, plaintiff has not sufficiently established the relevancy of the audiotape evidence to the trial court's custody decision. The record indicates that plaintiff offered the audiotape at trial in connection with a contempt matter concerning defendant's failure to timely bring the child to a pickup location for plaintiff's parenting time in December 2003. Plaintiff does not challenge the trial court's decision regarding the contempt matter. From our review of the record, we are satisfied that the trial court's legal error in excluding the audiotape was harmless as it pertains to the custody decision. MCR 2.613(A); MRE 103(a); *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). Nonetheless, because the trial court incorrectly applied the law in excluding the audiotape evidence, we do not preclude the trial court from considering the audiotape evidence when reconsidering its joint custody decision on remand.

We find no basis for relief with respect to the other evidentiary issues raised by plaintiff. With regard to plaintiff's offer to recall Robert Erard as a rebuttal expert witness, we hold that the trial court did not abuse its discretion by not allowing the proffered rebuttal testimony. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996); *Nolte v Port Huron Area School*

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MCR 7.212(C)(5), and thus we decline to address whether the parenting time arrangement in the trial court's divorce judgment establishes alternating residences within the meaning of MCL 722.26a(7)(a).

Dist Bd of Ed, 152 Mich App 637, 644-645; 394 NW2d 54 (1986). To the extent that plaintiff sought to have Erard testify about the letters that the trial court excluded as hearsay, we deem this issue abandoned because plaintiff has not sufficiently briefed the admissibility of the letters. *Peterson Novelties, supra* at 14; *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

With regard to the trial court's admission of plaintiff's summaries of deposition testimony, rather than the depositions themselves, we conclude that MRE 804(b)(5) is not dispositive of whether the trial court abused its discretion. A properly authenticated document may be excluded on a number of evidentiary grounds, including lack of relevancy of the content of the writing, in whole or in part, and MRE 403. See *People v Jenkins*, 450 Mich 249, 260; 537 NW2d 828 (1995). Further, a trial court may admit summaries under MRE 1006. See *Hofman v Auto Club Ins Ass'n*, 211 Mich App 55, 100; 535 NW2d 529 (1995). Under the circumstances, we are not persuaded that the trial court abused its discretion by admitting only the deposition summaries. To the extent that arguments were raised in defendant's responses to plaintiff's offer of proof, any error was harmless, inasmuch as the trial court recognized that the responses contained arguments when accepting them. *Craig, supra* at 76. Unlike a jury, a judge possesses an understanding of the law, which permits him or her to ignore such errors and decide a case solely on the basis of properly admitted evidence. *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001).

Turning to plaintiff's claim that the trial court erred in imputing to him annual income of $100,000, we note that plaintiff raises this issue in the context of principles applicable to a determination of the amount of a parent's child support obligation. Because the ultimate child support order entered by the trial court was based on a friend of the court recommendation, rather than the imputed income amount determined by the trial court, and plaintiff does not challenge the child support amount in the court's November 7, 2005, order awarding child support, this issue is moot.[2]

We deem plaintiff's other claims regarding the trial court's valuation of his business and its alleged failure to take into account improperly moved assets abandoned based on plaintiff's failure to adequately brief his claims. *Derderian, supra* at 388; *Peterson Novelties, supra* at 14. We note, however, that while the trial court assigned a present day value to plaintiff's business in its April 8, 2005, opinion, the evidence established that plaintiff began his business before the June 11, 1999, marriage date on which the trial court relied when dividing property. As plaintiff observes on appeal, assets accumulated before a marriage are generally not marital assets subject to division in a divorce action. See *Korth v Korth*, 256 Mich App 286, 291; 662 NW2d 111 (2003), and *Reeves v Reeves* 226 Mich App 490, 493-494; 575 NW2d 1 (1997). But a spouse's separate estate may be invaded for redistribution if one of two statutory exceptions exist. *Id.* at

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[2] We express no opinion regarding plaintiff's claim that the child support award should be modified if the child custody order is modified on remand. We note, however, that the trial court is empowered on remand to "take such action as law and justice require that is not inconsistent with the judgment of the appellate court." *McCormick v McCormick*, 221 Mich App 672, 679; 562 NW2d 504 (1997).

494-495, citing MCL 552.23 (support) and MCL 552.401 (spouse's contribution to the acquisition, improvement, or accumulation of the property). Because the trial court did not apply either exception, but rather awarded the entire business to plaintiff, we conclude that plaintiff has not established any prejudice caused by the trial court's assignment of a monetary value to his business. MCR 2.613(A). Whether the trial court should have awarded $70,000 to defendant requires consideration of the investment assets and the related lower court proceedings that formed the basis of the award. Because plaintiff has not sufficiently briefed this issue, we decline to address it. *Peterson Novelties, supra* at 14.

Affirmed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Bill Schuette